within one year from the 31st day of December of the year in which such assessment is made, apply for relief to the Circuit Court of the County or any City court of record of the city wherein such assessment was made. In such a proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or if the court in its discretion finds the ends of justice would be met by making an adjustment, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.

In the event it comes or is brought to the attention of the Commissioner of Revenue of the locality that the assessment of a parcel of real estate is improper or is based on obvious error, and should be corrected in order that the ends of justice may be served, the Commissioner shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief of any of several taxpayers.

* * * *

Title 8 (Civil Remedies and Procedure), Chapter 31 (Mandamus and Prohibition), Section 8-707. Defense; how made—

If the defendant appear and make defense, such defense may be by demurrer, or answer on oath, to the petition, or by both, such answer to be subject to any just exceptions by the petitioner. The court may permit amendments to such petition, as in other cases, should the demurrer by sustained.

STATEMENT OF THE CASE

Petitioners herein initially filed a Petition for a Writ of Mandamus in the Circuit Court of Fairfax County, Virginia; the prayer for relief in said Petition is quoted, in its entirety, as follows:

"Wherefore, Complainants pray:

1. For a Writ of Mandamus commanding the Fairfax County Board of Supervisors, its agents, employees, and anyone acting under its direction to tax Complainants' land on its present use value, and refund or allow credit for the taxes in excess thereof previously levied, and

2. For such other relief as the nature of the case deems meet."

Respondent herein demurred to the Petition for a Writ of Mandamus, pursuant to § 8-707 of the 1950 CODE OF VIRGINIA, as amended; this demurrer was sustained by the Circuit Court of Fairfax County, Virginia, after hearing the arguments of counsel for both Petitioners and Respondent. No request was made by Petitioners for leave to amend their petition, and there was subsequently entered an order sustaining the demurrer and dismissing the cause.

Petitioners filed notice of appeal and assignments of error, and submitted to the Supreme Court of Appeals of Virginia its Petition for a Writ of Error, to which Respondent replied with a Brief in Opposition. Thereafter, the Supreme Court of Appeals of Virginia entered the order a copy of which is attached to the Petition for a Writ of Certiorari filed herein by Petitioners.

ARGUMENT

The Petitioner in this case has presented for review by this Court the question of the interpretation of the term "fair market value," and apparently alleges that the use of that term in the laws of the Commonwealth of Virginia somehow denies the Petitioners herein due process and/or equal protection of the law.

The Supreme Court of Appeals of Virginia has construed the term "fair market value" in the case of *Tuckahoe*

Woman's Club v. *City of Richmond,* 199 Va. 734, 101 S.E.2d 571 (1958), wherein the Court spoke as follows:

> "Section 169 of our Virginia Constitution provides that in 'all assessments of real estate and tangible personal property shall be at their fair market value' in *Seaboard Air Line Railway* v. *Chamblin,* 108 Va. 42, 60 S.E. 727, this court adopted the definition given by Lewis on Eminent Domain (2d Edition, page 478) that the fair market value of property 'is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it' that definition has been repeated without change in many subsequent cases, a recent one being *Skyline Swannanoa* v. *Nelson County,* 186 Va. 878, 44 S.E.2d 437.
>
> "In estimating that value, as said in the first named case, all the capabilities of the property and all the uses to which it may be applied for which it is adapted, are to be considered, but it is not a question of value of the property to the owner.
>
> "In *Lehigh Portland Cement Co.* v. *Commonwealth* 146 Va. 146, 135 S.E. 669, it was said that in most cases an assessment based on the original value of the property less depreciation would afford an equitable basis of taxation, but would ignore the plain provisions of § 169 of the Constitution that all assessments shall be at their fair market value, and whatever the rule may be in other jurisdictions the rule laid down in § 169 is 'the only legal rule provided by law for the assessment of real estate and tangible personal property situated in this Commonwealth'." (101 S.E.2d, at 573, 574)

That case arose on an appeal to the Supreme court of Appeals of a decision of the Hustings Court of the City of Richmond, which court had sustained the assessment, despite the fact that the assessor had agreed that his evaluation was of the special value for a special use to a particular owner, and it was his judgment that the value of the

property in the market place would be considerably less. The reverse is true, in the allegations of the Petitioners herein, who allege that the assessing officers of the County of Fairfax must evaluate the properties in question on the basis of the uses to which the individual owners see fit to put them rather than on a market place basis considering all of the uses to which the property might potentially be put.

This Court has said, with respect to evaluation on the basis of actual use that value results from uses both present and prospective, or actual and/or anticipated, and that ad valorem type taxation is not designed to be a tax upon the earnings of a particular property in a particular use. *Branson* v. *Bush*, 251 U.S. 182, 40 Sup. Ct. 113, 64 Law. Ed. 215.

This case arose on a petition for a writ of mandamus seeking direction by the Circuit Court to the governing body, which body is not charged by law with responsibility for assessing real estate, to make assessments at what the Petitioners call "present use value." Petitioner has correctly stated the provisions of § 17-123 of the 1950 CODE OF VIRGINIA, as amended, which provides that courts of record shall have jurisdiction to issue writs of mandamus "according to the principles of common law." In the case of *Hall* v. *Stuart*, 198 Va. 315, 94 S.E.2d 284 (1956), the Supreme Court of Appeals of Virginia said:

> "Mandamus should never issue unless the petitioner's right to it is clear. . . . it should be issued only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy, and it is never granted in doubtful cases."
>
> "One of the fundamental principles underlying the entire jurisdiction is that mandamus never lies where

the party aggrieved has another adequate remedy at law, by action or otherwise; and wherever an express remedy is afforded by statute, plain and specific in its nature, and sufficiently adequate to redress the grievance complained of, mandamus will not lie." (94 S.E.2d at 290)

In *Andrews* v. *Shepherd*, 201 Va. 412, 111 S.E.2d 279, (1959), the Supreme Court of Appeals said:

"It is well settled that mandamus is the proper remedy to compel to public officers, including municipal councils, to perform their ministerial duties, but that it will not lie to control or review the acts of public officers and municipal councils in matters in which they have been vested with discretion, in the absence of arbitrary action, or refusal to exercise their discretion." (111 S.E.2d, at 282)

It is the contention of Respondent herein that the dispute between the Petitioners and the assessing officials of the County of Fairfax turns on the value applied by those officials to the properties of the respective petitioners, and that the only order which properly could be entered in a mandamus action would be one requiring the assessing officials to follow the constitutional mandate of ascertaining the fair market value of the properties. It is in the discretion of the assessing officials, taking into account all of the information available to them, to ascertain a particular value for a particular parcel of property, and it is not the office of the extraordinary writ of mandamus to supervise or review the manner in which that particular discretion was exercised. As the Supreme Court of Appeals of Virginia has said in the case of *May* v. *Whitlow*, 201 Va. 533, 111 S.E.2d 804 (1960):

"A writ of mandamus is an extraordinary remedial process. It lies to compel performance of a ministerial act by a public official only when there is a clear

and unequivocal duty imposed by law upon the officer to perform the act. The absence of another adequate remedy at law is essential to its application." (111 S.E.2d at 807)

Respondent respectfully submits that § 58-1145 of the 1950 CODE OF VIRGINIA, as amended, provides precisely such a specific statutory remedy as is referred to in the foregoing cases by the Supreme Court of Appeals, and that therefore a mandamus proceeding is not a proper one in which to seek judicial review of the actions of the assessing officials of the County. In the alternative, Respondent submits that in the event the assessing officials were amenable to the entry of an order in the nature of a writ of mandamus, that it could only direct them to assess the property at fair market value, which was not the relief sought by the Petitioners in the trial court.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari for the following reasons:

1. That the Petition, in the absence of a transcript of the Record below, is not properly submitted under the rules of this Court.

2. That no substantial Federal question was presented or decided in the courts below, nor is a substantial Federal question presented by the Petition for a Writ of Certiorari.

3. That the granting of the relief sought would controvert the provisions of the Constitution and laws of the Commonwealth of Virginia, which Constitution and laws in the respects here questioned embody principles often

upheld both by the highest Court of the Commonwealth and by this Court.

Respectfully submitted,

DONALD C. STEVENS
County Attorney
Counsel for Respondent

CERTIFICATE

I hereby certify that I have on this 12th day of February, 1970, deposited in the United States Post Office at Fairfax, Virginia, with first-class postage prepaid, a copy of the foregoing Brief in Opposition, addressed to Bertie E. Tubaugh, Counsel for Petitioners, 530 Springvale Road, Great Falls, Virginia, 22066, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States.

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DONALD C. STEVENS
Counsel for Respondent